No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1939

EARL H. MCDONALD AND JOSEPH F. WHITNOTER,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 28–31) are reported at 166 F. 2d 957. The findings of fact and conclusions of law of the district court (R. 7–8) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 16, 1948 (R. 32). The petition for a writ of certiorari was filed March 16, 1948, and certiorari was granted on April 19, 1948

(R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner Washington, who merely happened to be present at the time property was seized from petitioner McDonald's room and who had no proprietary interest either in the premises or the seized articles, is entitled to challenge the validity of the seizure.

2. Whether petitioner McDonald has standing to challenge the legality of the means by which officers gained access to the hallway of a rooming house in which he rented a room.

3. Whether, incident to the arrest of petitioner McDonald for a crime observed by the officers by looking through the transom of McDonald's room, the officers had power to seize instrumentalities of the crime open to view.

STATUTES INVOLVED

The pertinent provisions of the District of Columbia Code appear in the Appendix *infra*, pp. 26–28.

STATEMENT

On August 26, 1946, petitioners McDonald and Washington were indicted in the United States District Court for the District of Columbia in

four counts charging offenses in the carrying on of a lottery known as the numbers game, in violation of 22 D. C. Code 1501, 1502, and 1504 (R. 3–4). They waived a jury trial (R. 9) and were found guilty on all counts by the court. McDonald was sentenced to imprisonment for a term of six to eighteen months (R. 10). Washington was sentenced to imprisonment for sixty days (R. 10–11). Upon appeal to the Court of Appeals for the District of Columbia, the judgments were affirmed, one judge dissenting (R. 32).

The only issue in the case concerns the legality of the seizure of gambling paraphernalia from McDonald's room on June 22, 1946. The facts concerning this issue may be summarized as follows:

One Barbara Terry operates a rooming house at 1608 Third Street, N.W., in Washington, D. C. (R. 11, 15). In October 1945, petitioner McDonald, who had a home in Washington (R. 19), rented a room from her (R. 13), and this room was subsequently used for the operation of a lottery known as the numbers game (R. 18–19).

McDonald was known to the Metropolitan Police as a numbers operator, and less than a year before he had been arrested at a numbers headquarters at another address. Some time prior to the arrests in question, the police received information that he had established his headquarters in his home and from the activities

they observed there, they concluded that this information was correct. (R. 21.)

Before the police could act, however, McDonald moved his activities to the room in Mrs. Terry's house (R. 21). On several occasions, the police observed him enter the rooming house early in the afternoon and leave between 5:30 and 6:30 p. m., the hours during which operations at the headquarters of a numbers game are customarily carried on (R. 21–22). On no occasion while the police had the rooming house under observation did McDonald remain over night (R. 22).

On June 22, 1946, during the afternoon, three police officers surrounded the rooming house. One of the officers heard a noise that sounded like a typewriter or adding machine in operation, and he knew that adding machines are customarily used in the operation of a numbers game. McDonald had used them before in his illicit lottery activities (R. 24–25). At this juncture, officer Ogle raised a side window facing on the porch of the house and entered through the window (R. 17). The room he entered proved to be that of Mrs. Terry, the landlady, and Ogle identified himself to her (R. 11, 15). He then opened the front and back doors of the house to admit the other two officers (R. 12, 18). The three officers searched the various rooms on the first floor and then they searched the rooms on the second floor (R. 12–13).

When they reached McDonald's room at the

rear of the house, they found the door locked (R. 13). Officer Ogle thereupon procured a chair and by standing on it he was able to look through a transom into the room (R. 13). He observed both petitioners in the room, as well as numbers slips, money piled on the table, and adding machines (R. 23). While still standing on the chair, Ogle called to McDonald to open the door, and McDonald did so (R. 23). Petitioners were arrested (see Pet. 3) and the officers seized the machines and papers (see R. 14, 17).

The officers did not have either a warrant of arrest or a search warrant (R. 18). They had discussed with the United States Commissioner the facts which they knew concerning McDonald's operations before they actually observed him, but had not obtained a warrant (R. 24, 26–27).

SUMMARY OF ARGUMENT

I. It is settled law in the federal courts that, since the rights guaranteed by the Fourth Amendment are personal, they can be asserted only by the person whose rights have been violated. *Goldstein* v. *United States,* 316 U. S. 114, 121. Basically, this rule rests on the theory that the suppression of evidence wrongfully seized is a method of vindicating a constitutional right and not the means of disciplining police officers. Suppression is, essentially, a remedial measure, not a punitive one. Since the right protected, the right

to privacy, is a personal one, the punitive effect of the rule requiring suppression is enforced only to the extent that the constitutional right of the person before the court has been invaded.

Applying this rule to the instant case, it is clear that petitioner Washington has no standing to have the evidence seized by the police officers suppressed as to him. He was a stranger to the premises who happened to be in McDonald's room when the arrest and seizure occurred, and he had no property interest in the objects taken.

By the same token, petitioner McDonald has no standing to complain of the illegal act of the police officers in entering Mrs. Terry's rooming house and gaining access to the hallway. Although that act of entry was a trespass, it was not a trespass which violated McDonald's rights under the Fourth Amendment. Hence, he cannot rely on that trespass to make out a violation of his constitutional rights.

The fact that McDonald had the right to use the entrance and the hallway leading to his room did not confer upon him sufficient interest in the premises to enable him to claim the protection of the Fourth Amendment with respect thereto. He had no control over that area and was not in a position to determine who should or should not be allowed access thereto. Hence, the entrance and hallway were not private premises in relation to McDonald, and a trespass on those premises was not a violation of his right of privacy.

II. So far as the constitutional rights of McDonald are concerned, the only significant facts are that the officers, looking through a transom into his room, observed him in the act of committing an offense; then obtained entrance to the room for the purpose of arresting him; and seized as incident to the arrest the instrumentalities of the crime which had just been committed. There was no search, merely the seizure of equipment open to view.

The act of the officers in observing McDonald through the transom was not a search. The words search and seizure cannot be extended "as to forbid hearing or sight." *Olmstead* v. *United States*, 277 U. S. 438, 465.

Having observed petitioner in the act of committing an offense, the police officers were then and there under a duty to arrest him. 4 D. C. Code 140. Before they entered McDonald's room, they had identified both the crime and the offender. The entry was therefore a proper entry for the purpose of arresting petitioner.

As incident to the arrest, the officers had the right to seize the instrumentalities of the crime open to view. That right has been upheld in numerous state and federal decisions, including most of the major decisions of this Court relating to search and seizure from *Weeks* v. *United States*, 232 U. S. 383, through *Harris* v. *United States*, 331 U. S. 145. We do not understand the decision of this Court in *Trupiano* v. *United*

States, 334 U. S. 699, to have changed that rule as applied to a situation where officers had neither time nor information to get a warrant.

Here the officers did not have sufficient information to get a search warrant until they saw petitioner committing an offense. After they saw him, they had no time to get a warrant because there was a real possibility that petitioner, who did not live at the rooming house, would have departed with much of the incriminating evidence. An immediate arrest was required, both by statute and by factual realities.

After the arrest, any attempt to take control of the property would be a seizure, even if one officer remained on guard while another sought a warrant. If the officers had authority to seize at all, no reason exists why they should not have taken the property with them when they took the offender to the police station. The entry was lawful, there was no search, and the property seized was property which petitioner did not rightfully own. A seizure under such circumstances is a reasonable seizure under the Fourth Amendment.

ARGUMENT

I

ONLY THE VICTIM OF AN ILLEGAL SEARCH HAS STANDING TO OBJECT TO THE ADMISSION OF ILLEGALLY SEIZED EVIDENCE

A. Since Fourth Amendment rights are personal, only the person whose rights have been

violated has standing to assert them.—It is settled law in the federal courts that, since the rights guaranteed by the Fourth Amendment are personal, they can be asserted only by the person whose rights have been violated. This Court recognized the force of this rule and applied the same principle in *Goldstein* v. *United States*, 316 U. S. 114, when it held that one not a party to unlawfully intercepted communications could not object to the introduction of evidence obtained as the result of illegal wire tapping. This Court there said, at p. 121:

> * * * While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. * * * We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act. * * *

See, also, *Agnello* v. *United States*, 269 U. S. 20, where this Court allowed the judgment against Agnello's codefendants to stand despite the reversal as to Agnello because of the admission of evidence illegally seized from his home. While in that case it appeared that the illegally seized evidence had not been introduced against the codefendants, it is significant that, in affirming the

judgment as to the codefendants, this Court said at page 35: "The introduction of the evidence of the search and seizure did not transgress their constitutional rights."

As this Court recognized in the *Goldstein* case, the rule that only the victim of an illegal search has standing to complain has been universally applied in the lower federal courts from the period when this Court's decision in *Weeks* v. *United States*, 232 U. S. 383, first outlawed illegally seized evidence [1] until the present.[2]

It has been applied with logical consistency in many different factual situations. Thus, for example, it has been held, not only that one with no interest in the premises searched or property taken, who was not present at the time of search, has no standing to complain,[3] but that a person

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[1] For earlier cases applying the rule, see *Moy Wing Sun* v. *Prentis*, 234 Fed. 24, 26 (C. C. A. 7); *Tsuie Shee* v. *Backus*, 243 Fed. 551, 552 (C. C. A. 9); *Chicco* v. *United States*, 284 Fed. 434, 436–437 (C. C. A. 4); *Lusco* v. *United States*, 287 Fed. 69, 70 (C. C. A. 2); *Goldberg* v. *United States*, 297 Fed. 98, 101 (C. C. A. 5).

[2] For recent decisions applying the same rule, see *Lagow* v. *United States*, 159 F. 2d 245, 246 (C. C. A. 2), certiorari denied, 331 U. S. 858; *Grainger* v. *United States*, 158 F. 2d 236, 237 (C. C. A. 4); *Hall* v. *United States*, 150 F. 2d 281, 283 (C. C. A. 5), certiorari denied, 326 U. S. 741; *Gibson* v. *United States*, 149 F. 2d 381, 384 (App. D. C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U. S. 724.

[3] E. g., *Hall* v. *United States*, 150 F. 2d 281, 283 (C. C. A. 5), certiorari denied, 326 U. S. 741; *Bushouse* v. *United States*, 67 F. 2d 843, 844 (C. C. A. 6); *Wheelett* v. *United States*, 43 F. 2d 358, 359 (C. C. A. 10).

actually present at the time of search, who has no interest in the premises or property, is in the same position.[4] On this basis, employees working at the place where property is seized and apparently in control thereof cannot attack the validity of a search and seizure since they have no property interest in the seized objects.[5] This rule applies to stockholders and officers of a corporation,[6] even where the person seeking the return of seized property is the sole stockholder.[7] In fact, even where property is taken from a person claimed by the Government to be the owner, if that person disclaims such ownership, he cannot assert that his rights have been violated, the courts holding him to the choice of "one horn of the dilemma."[8]

To some extent, the rule probably arises from the fact that motions to suppress originated as

[4] E. g., *Gibson* v. *United States*, 149 F. 2d 381, 384 (App. D. C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U. S. 724; *In re Nasetta*, 125 F. 2d 924, 925 (C. C. A. 2); *Kwong How* v. *United States*, 71 F. 2d 71, 75 (C. C. A. 9).

[5] E. g., *United States* v. *Muscarelle*, 63 F. 2d 806 (C. C. A. 2), certiorari denied, 290 U. S. 642; *Mello* v. *United States*, 66 F. 2d 135, 136 (C. C. A. 3); *Kelley* v. *United States*, 61 F. 2d 843, 845 (C. C. A. 8).

[6] E. g., *United States* v. *DeVasto*, 52 F. 2d 26, 29 (C. C. A. 2), certiorari denied, 284 U. S. 678; *Newingham* v. *United States*, 4 F. 2d 490, 493 (C. C. A. 3), certiorari denied, 268 U. S. 703.

[7] *Lagow* v. *United States*, 159 F. 2d 245, 246 (C. C. A. 2), certiorari denied, 331 U. S. 858.

[8] *Connally* v. *Medalie*, 58 F. 2d 629, 630 (C. C. A. 2); see also *Grainger* v. *United States*, 158 F. 2d 236, 237 (C. C. A. 4); *McMillan* v. *United States*, 26 F. 2d 58, 59–60 (C. C. A. 8).

actions to compel the return of property wrongfully seized. E. g., *Weeks* v. *United States,* 232 U. S. 383; *United States* v. *Mills,* 185 Fed. 318 (C. C. S. D. N. Y.). Manifestly, a person has no standing to seek the return of property in which he has no proprietary or possessory interest. For example, in the case of *Shields* v. *United States,* 26 F. 2d 993, 996 (App. D. C.), the court said:

> Nowhere in this petition is it alleged that any of the property seized is claimed to be the property of the petitioner, nor does he ask for its return to him. Clearly, to be entitled to its return, he must assert an interest in it. * * *

Or, as the Court phrased it in *Kelleher* v. *United States,* 35 F. 2d 877, 879 (App. D. C.), one without interest in the property is not entitled "to ask for the return of the property to a third person."

The rule has, however, a broader and a firmer base. Essentially, it rests on the theory that the suppression of evidence wrongfully seized is a method of vindicating a constitutional right, and not a means of disciplining police officers. Suppression is a remedial measure, not a punitive one. Since the right protected—the right to privacy—is a personal one, the punitive effect of the rule requiring suppression is enforced only to the extent that the constitutional right of the person before the court has been invaded. As the Circuit Court of Appeals for the Second Circuit,

speaking through Judge Learned Hand, said in *Connally* v. *Medalie*, 58 F. 2d 629, 630:

> * * * The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (*Burdeau* v. *McDowell*, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless. * * *

The principle that only the person who has the privilege may assert it has been applied in other situations. As noted above, this Court, on the authority of the Fourth Amendment cases, held that only the person whose privacy had been violated had the right to complain of illegal wire tapping. *Goldstein* v. *United States*, 316 U. S. 114. With respect to the privilege against self-incrimination, if a witness waives his privilege or

the court requires him to answer, a party to the action has no right to interfere or to complain of the answer. *Morgan* v. *Halberstadt*, 60 Fed. 592, 596–597 (C. C. A. 2), certiorari denied, 154 U. S. 511. Cf. *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361. Certainly a person incriminated by documents held by another would have no standing to enter objection if the owner of the documents chose to waive his constitutional right of privacy and turn the documents over to the Government. No more should a defendant rightfully before the court escape just punishment because the constitutional rights of some other person have been wrongfully invaded.

The rule requiring suppression of evidence is an exception to the general principle that relevant evidence will be considered no matter how it was obtained. The exception has never been extended beyond the point necessary to protect the person whose rights have been violated. As this Court said in another context in *United States* v. *Mitchell*, 322 U. S. 65, 70–71, when it held that subsequent illegal conduct by police officers did not vitiate a valid confession previously obtained:

> * * * Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

B. *Petitioner Washington, who had no interest in the premises searched or the property taken,*

has no standing to have the seized evidence suppressed as to him.—Applying the rule discussed above, that only a person whose constitutional rights have been invaded has the right to have illegally seized evidence suppressed, it is clear that, as both the majority and dissenting judges below agreed (R. 29, 31), petitioner Washington has no standing to have the evidence seized by the police officers suppressed as to him. He was a stranger to the premises, who happened to be in McDonald's room when the arrest and seizure occurred, and he had no property interest in the objects taken (R. 16, 19). As indicated above, the decisions uniformly hold that such a person, whose constitutional rights have not been infringed, has no standing to have evidence suppressed.

Nor is there any possibility of prejudice to petitioner Washington by reason of the fact that he was jointly tried with petitioner McDonald, assuming that as to McDonald the evidence was wrongfully admitted. If the evidence was admissible against Washington at all, it would have exactly the same effect in establishing his guilt whether he was tried alone or with someone else. The exclusion of the seized evidence as to McDonald would not in any way affect the judgment as to Washington. His attorney conceded at the trial that if he was wrong on the law, i. e., wrong as to his motion for suppression, his client was guilty (Transcript of Trial p. 16).[9]

[9] On file with the Clerk of this Court.

C. Petitioner McDonald is not entitled to attack the officers' entry into Mrs. Terry's house.— As to petitioner McDonald, he does of course have standing to attack the entry into his room and the seizure of the property in his possession if such entry and seizure were illegal. However, again applying the rule discussed in Point A above, McDonald has no standing to complain of the illegal act of the police officers in entering Mrs. Terry's rooming house and gaining access to the hallway. That act of entry was a trespass, but it was not a trespass which violated McDonald's rights under the Fourth Amendment. He, therefore, cannot rely on that trespass to make out a violation of his constitutional rights which would give him the right to have evidence suppressed.

In *Hester* v. *United States*, 265 U. S. 57, this Court held that a trespass on land owned by the person claiming to be the victim of an illegal search could not be deemed the beginning of a search, since the land was not an area within the protection of the Fourth Amendment. As far as a particular defendant before the court is concerned, the home or effects of some other person is no more within the area which the Fourth Amendment protects as to him than is the land around his own home. Hence, applying the rule that only the person whose rights have been in-

fringed has standing to assert them, the courts have consistently ruled that a trespass on the land or a wrongful search of the property of another, even where the trespass may be a violation of the Fourth Amendment as to such other person, cannot be availed of by a person whose own constitutional rights have not been invaded, although the tresspass precedes the search complained of. *Safarik* v. *United States*, 62 F. 2d 892, 895, rehearing denied, 63 F. 2d 369 (C. C. A. 8); *United States* v. *De Vasto*, 52 F. 2d 26, 29 (C. C. A. 2), certiorari denied, 284 U. S. 678; *Shore* v. *United States*, 49 F. 2d 519, 521–522 (App. D. C.), certiorari denied, 283 U. S. 865; *Coon* v. *United States*, 36 F. 2d 164 (C. C. A. 10); see also *United States* v. *Muscarelle*, 63 F. 2d 806 (C. C. A. 2), certiorari denied, 290 U. S. 642.

The dissenting opinion below, although recognizing the force of the rule, seeks to escape from its logic by taking the position that petitioner, as lessee of a room in Mrs. Terry's home, had such an interest in the hallway leading to his room, that the forcible entry therein was a forcible intrusion on his privacy (R. 31). Petitioner did, of course, have the right to use the entrance and hallway to get to his room, but we do not believe that such right can be deemed to confer upon him sufficient interest in those premises for him to be able to claim the protection of the Fourth Amendment with respect thereto. Petitioner had

no control over the hallway or entrance. He was not in a position to determine whether the door should be kept open or locked. He was not in a position to determine whether any individual should or should not have access thereto. Had Mrs. Terry voluntarily opened the door for the police officers, petitioner's objection to their entry could not have overridden her consent. See *Milyonico* v. *United States,* 53 F. 2d 937 (C. C. A. 7), certiorari denied, 286 U. S. 551. Hence the entrance and the hallway were not private premises in relation to petitioner, and a trespass on those premises was not a violation of petitioner's right of privacy. See *Ward* v. *State,* 40 Okla. Cr. 377, holding that one employed and living in a rooming house had no interest which would entitle him to complain of an illegal entry to the hallway; *Allman* v. *State,* 107 Tex. Cr. 439, holding that the interest of a person renting a room did not extend beyond his room; *Whitlock* v. *State,* 123 Tex. Cr. 279, holding that a bathroom controlled by the landlady and used by a tenant was not an area protected as to the tenant.

Brown v. *United States,* 83 F. 2d 383 (C. C. A. 3), relied upon by petitioner (Br. 7–8), is not to the contrary, for there the rooms of the tenants were apparently searched. It is not questioned that here petitioner does have standing to complain of a search of his room if there was a search which was improperly conducted. We dis- ss that question

in Point II, *infra*. As to the entrance into the hallway, however, the important point is that petitioner had no dominion or control over that area and therefore has no standing to complain of any illegal act in that area. Not until the officers reached petitioner's room was petitioner in the position to invoke his constitutional rights under the Fourth Amendment with respect to their acts.

II

THE SEIZURE FROM McDONALD'S ROOM OF THE INSTRUMENTALITIES OF A CRIME COMMITTED IN THE PRESENCE OF THE OFFICERS WAS PROPER UNDER THE FOURTH AMENDMENT

Considered in relation to the constitutional rights of petitioner McDonald, the following facts only are significant: From the hallway outside of petitioner's room, officers, looking through a transom, observed petitioner in the act of committing an offense. They obtained entrance to the room by force of their office, arrested petitioner, and seized the instrumentalities of the crime which they had just seen being committed. The question is whether on those facts alone the seizure here involved is lawful. We submit that it was.

A. *The act of observing petitioner through the transom of his room did not constitute a search within the meaning of the Fourth Amendment.*— To see what is visible to the eye is not a search within the meaning of the Fourth Amendment. In the famous case of *Entick* v. *Carrington*, 19

How. St. Tr. 1029, the court in the course of its opinion stated (at p. 1066), "the eye cannot by the laws of England be guilty of a trespass." The same thought was expressed by this Court in *Olmstead* v. *United States,* 277 U. S. 438, 465, when it ruled that even a liberal construction of the Fourth Amendment could not extend "the words search and seizure as to forbid hearing and sight."

In *Agnello* v. *United States,* 269 U. S. 20, 28–30, this Court approved a search and seizure made after arresting officers had observed an illicit transaction through the window of a home and had then "rushed in and arrested all the defendants." In *Taylor* v. *United States,* 286 U. S. 1, this Court said, without suggesting that a search had occurred at that point, that with the knowledge the agents had obtained by looking through a small opening and smelling the odor of whiskey, they had probable cause for obtaining a search warrant. In *United States* v. *Lee,* 274 U. S. 559, 563, this Court upheld a search following the observation of illegal conduct by throwing a searchlight on a boat. Similarly, lower federal courts have upheld searches where police obtained knowledge of the commission of a crime by looking through windows (*Carvalho* v. *United States,* 54 F. 2d 232 (C. C. A. 1); *United States* v. *Feldman,* 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579), through a crack in a door (*Gracie*

v. *United States,* 15 F. 2d 644 (C. C. A. 1)), and through a transom (*Mulrooney* v. *United States,* 46 F. 2d 995 (C. C. A. 4)). In none of these cases was it even suggested that such means of detecting crime by observation from a vantage point constituted a search. Accordingly, when the officers looked through the transom into petitioner McDonald's room, they did not search his room.

B. *As incident to petitioner's arrest for a crime committed in their presence, the officers had the right to seize the instrumentalities of the crime.*— Having observed petitioner in the act of committing an offense, the police officers were under a duty then and there to arrest him. See 4 D. C. Code 140, 143, *infra,* p. 26. The situation here is unlike that before this Court in *Johnson* v. *United States,* 333 U. S. 10, cited by petitioners (Br. 6), for here, before the officers entered the room, they had identified both the crime and the offender. Although the entry into McDonald's room was made under color of office, the entry was for the proper purpose of arresting petitioners, an entry not only authorized but required by statute.

As incident to that arrest, the officers seized the instrumentalities of the crime which they had just seen being committed. There was no search, merely the seizure of the equipment which was open to view. In the Government's Brief in the case of *Trupiano* v. *United States,* 334 U. S. 699 (No. 427, Oct. T. 1947), we set forth at pages 25

to 32, the long unbroken line of reported decisions in state, federal and English courts, including the numerous decisions of this Court, which have recognized and upheld seizures incident to arrest of the instrumentalities of a crime open to view at the place where the crime was committed. Such seizures were upheld in early state decisions preceding the *Weeks* rule. *Banks* v. *Farwell,* 21 Pick. 156 (Mass. 1839); *Houghton* v. *Bachman,* 47 Barb. 388 (N. Y. 1866); *Kneeland* v. *Connally,* 70 Ga. 424, 425 (1883); *State* v. *Robbins,* 124 Ind. 308, 311 (1890). The right to seize was recognized and where necessary upheld in almost every important search and seizure decision by this Court from *Weeks* v. *United States,* 232 U. S. 383, 392, through *Harris* v. *United States,* 331 U. S. 145, 150–151. See dissenting opinions in that case at pp. 169, 186.[9] As the Georgia court said in the early case of *Kneeland* v. *Connally, supra,* a case involving the seizure of gaming equipment (70 Ga. at 425):

> * * * The warrant to seize the keeper of the unlawful house or room carries with it the power or legal authority to seize the implements of his crime, just as a warrant to arrest a man charged with murder would

[9] See also *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *United States* v. *Lee,* 274 U. S. 559, 563; *Marron* v. *United States,* 275 U. S. 192, 198–199; *Go-Bart Co.* v. *United States,* 282 U. S. 344, 358; *Lefkowitz* v. *United States,* 285 U. S. 452, 465.

> carry with it authority to seize the bloody knife or smoking pistol which killed, or a warrant to arrest a counterfeiter would include the legal seizure of his tools for counterfeiting. No separate warrant is necessary in either case.

We do not understand the *Trupiano* decision to have changed that rule as applied to a situation like that presented here, where officers had neither time nor information to obtain a search warrant before the arrest and seizure were made.

The officers could not have obtained a search warrant before they observed petitioner through the transom of his room. The record shows that they had discussed with the United States Commissioner the information which they had before they actually observed the offense, and presumably the Commissioner had not deemed that information sufficient to constitute probable cause for the issuance of a warrant. Hence, not until they actually saw McDonald committing an offense, i. e., not until they had information which required the immediate arrest of petitioner, did they have sufficient information to obtain a search warrant.

The officers had no time to obtain a search warrant after they observed the offense before they arrested petitioners. One of the officers testified in this case that it was his experience with violations of this character that "if we leave the premises and go to the United States Commis-

sioner's Office, when we return to the premises, I will say in 99 percent of the cases, there will be nothing there" (R. 26). The necessity for immediate action was particularly great here since McDonald did not live at the rooming house. There was a strong probability, almost a certainty, that, had the arrest been delayed until a search warrant could be obtained, McDonald would have departed for the day and that much of the significant evidence, the tickets and money, would have disappeared. An immediate arrest was required, both by statute and by factual realities.

After the officers had arrested petitioner, they would, we submit, have been derelict in their duty had they left the room without taking the contraband property with them. Certainly, if they had left it unguarded, there was real danger that someone might remove the property. Conceivably, since the arrest happened to be made by more than one person, one officer could have remained on guard while another went to get a warrant. If in the meantime, however, some person had tried to remove that property, the officer on guard would have been required to use the force of his office to prevent removal thereof. The mere standing on guard over the property would itself be a seizure. Hence, if the officers had the right to take control of the property—and, we submit, officers must have that right under circumstances such as are presented

in this case—then we do not see how any constitutional principles are vindicated by requiring what is in effect a double seizure instead of allowing the officers to take the property with them at the time they take the prisoner into custody.

The seizure of the instrumentalities of crime incident to a lawful arrest, where the seizure is made at the place where the offense has been committed and where the instrumentalities of the crime are open to view, involves no element of an invasion of the right to privacy. The entry is lawful, there is no search, and the property taken is property which the defendant cannot rightfully own. That kind of a seizure has been recognized since the time of the adoption of the Fourth Amendment. It is therefore a reasonable seizure under the Fourth Amendment.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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OCTOBER 1948.

APPENDIX

The pertinent provisions of the District of Columbia Code are as follows:

§ 4–140. The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

* * * * *

§ 4–143. If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District jail or penitentiary not exceeding two years, or by a fine not exceeding $500.

* * * * *

§ 22–1501. If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any

chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

§ 22–1502. If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

§ 22–1504. Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years.

U. S. GOVERNMENT PRINTING OFFICE: 1948